

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO INC. SECURITIES LITIGATION

Case No. 07-MD-1902 (JSR)

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This Document Relates to:

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KENNETH M. KRYS, et al., : Case No. 08-CV-3065 (JSR)
: Case No. 08-CV-3086 (JSR)

Plaintiffs, :

:
:

-against- :
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:

CHRISTOPHER SUGRUE, et al., :
:
:

Defendants. :
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:

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KENNETH M. KRYS, et al. : Case No. 10-CV-3594 (JSR)
Plaintiffs, :

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:
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-v- :
:
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DEUTSCHE BANK SECURITIES INC., et al. :
:
:

Defendants. :
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**RULE 56.1 STATEMENT OF MOVING DEFENDANTS
IN SUPPORT OF SUMMARY JUDGMENT**

In accordance with Rule 56.1 of this Court's Civil Rules, Defendants

PricewaterhouseCoopers LLP ("PwC"), Credit Suisse Securities (USA) LLC ("Credit Suisse"),

Merrill Lynch, Pierce, Fenner & Smith, Incorporated, as successor-by-merger to Banc of

America Securities LLC ("BAS"), Deutsche Bank Securities Inc. ("DBSI"), Mayer Brown LLP

("Mayer Brown"), Edward Best, Joseph P. Collins, Paul Koury, Grant Thornton LLP ("Grant

Thornton") and Mark Ramler (collectively, "Moving Defendants") respectfully submit the

following statement of material facts as to which there is no genuine issue to be tried.

1. Plaintiff SPhinX Managed Futures Fund SPC (“SMFF”) was comprised of various portfolios (“Portfolios”), which maintained cash accounts at Refco Capital Markets, Ltd. (“RCM”) (collectively, the “RCM Accounts”) starting in or about December 2002. *See Declaration of James J. Capra, Jr. in Support of PwC’s Motion for Summary Judgment*, dated August 2, 2012 (“Capra Decl.”), ¶ 3 and Exhibit 1 thereto (“Report on cash balances and transfers in respect of the SPhinX Group of Companies,” signed and dated June 29, 2012 by Kenneth M. Krys (“Krys Expert Report”)) 3.4, 3.6, 3.7, Appendix 3 and Appendix 6.

2. On or about October 12, 2005, SMFF transferred \$312,046,266 (approximately, and hereinafter, “\$312 million”) from the RCM Accounts (the “October 2005 Transfer”) to Refco LLC. *See Capra Decl. ¶ 5 and Exhibit 1 (Krys Expert Report) 3.8, Appendix 6.*

A. The Timing of Events at Refco

3. On June 8, 2004, THL Refco Acquisition Partners, Refco Group Ltd., LLC (“RGL”), and certain other parties entered into an equity purchase and merger agreement. The agreement provided for a series of transactions through which THL Refco Acquisition Partners and its affiliates and co-investors would own approximately 57% of an entity that was to become the parent of RGL (the “LBO Transaction”). *See Capra Decl. ¶ 8 and Exhibit 3 (Confidential Offering Circular excerpt).*

4. In connection with the LBO Transaction, Refco Finance Holdings LLC (which was later merged into RGL) and Refco Finance Inc. (“Refco Finance”) offered notes (“Notes”) for purchase through a Confidential Offering Circular, dated July 22, 2004. *See Capra Decl. ¶ 8 and Exhibit 3 (Confidential Offering Circular excerpt).*

5. The LBO Transaction closed on August 5, 2004. *See Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶ 254.*

6. RGL and Refco Finance filed an S-4 registration statement with the Securities and Exchange Commission (“SEC”) on October 12, 2004 in connection with an exchange offer for the Notes, which was RGL’s first SEC filing. *See Capra Decl. ¶ 9 and Exhibit 4 (S-4 filing, cover page).*

7. Refco Inc. (“Refco”) filed an S-1 with the SEC on April 8, 2005 in connection with its initial public offering (“IPO”). *See Capra Decl. ¶ 10 and Exhibit 5 (S-1 filing, cover page).* Refco’s IPO commenced on or about August 10, 2005. *See Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 279, 907.*

B. Changes in SMFF’s Cash Balance at RCM Over Time

8. The table below shows the change in SMFF’s balances in the RCM Accounts from different dates through the time immediately preceding the October 2005 Transfer:

Starting Date	Starting Date Description	Starting Date Balance	October 2005 Transfer	(Decrease) in Balance from Starting Date to October 2005 Transfer
August 5, 2004	Refco’s LBO	\$541,577,862	\$312,046,266	(\$229,531,596)
October 12, 2004	Refco’s initial S-4 Filing	\$586,087,197	\$312,046,266	(\$274,040,931)
April 8, 2005	Refco’s initial S-1 Filing	\$522,235,446	\$312,046,266	(\$210,189,180)
August 10, 2005	Commencement of Refco’s IPO	\$395,230,539	\$312,046,266	(\$83,184,273)

See Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.

9. At all times between August 5, 2004 and late September 2005, the balance in the RCM Accounts was greater than \$312 million. *See Capra Decl. ¶¶ 2, 7, and Exhibit 1 (Krys Expert Report) Appendix 6.*

C. PwC

10. PricewaterhouseCoopers LLP (“PwC”) was first engaged by RGL to provide accounting advisory services on or about May 5, 2004. *See Capra Decl.* ¶¶ 11, 12, and Exhibit 6 (Amended Complaint excerpt) at ¶ 570 and Exhibit 7 (PwC Engagement Letter).

11. On May 5, 2004, preceding the engagement of PwC by RGL, the balance in the RCM Accounts was \$429,220,086. During the period from May 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$117,173,820. *See Capra Decl.* ¶ 2 and Exhibit 1 (Krys Expert Report) Appendix 6.

D. Credit Suisse, BAS, and DBSI

12. Credit Suisse, BAS, and DBSI served as initial purchasers and joint book-running managers of the private placement of the Notes in connection with the LBO Transaction. *See Capra Decl.* ¶¶ 8, 11, and Exhibit 3 (Confidential Offering Circular excerpt) and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 877, 880.

13. On August 5, 2004, preceding the LBO Transaction, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See Capra Decl.* ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) 4.4, Appendix 6 and Exhibit 2.

14. Credit Suisse and BAS (and other financial institutions not a party to this action) served as joint book-running managers of the underwriting syndicate for the IPO, and DBSI (and other financial institutions not a party to this action) served as co-managers and underwriters for the IPO. *See Capra Decl.* ¶¶ 10, 11, Exhibit 5 (S-1 excerpt), and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 877, 880.

15. On August 10, 2005, preceding the IPO, the balance in the RCM Accounts was \$395,230,539. During the period from August 10, 2005 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$83,184,273. *See Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6 and Exhibit 2.*

E. Grant Thornton Defendants

16. Grant Thornton LLP served as outside auditor to RGL, issuing audit opinions on RGL's consolidated financial statements. The first time any Grant Thornton audit opinion relating to Refco appeared in any public filing was in RGL's initial form S-4 registration statement, filed with the SEC on October 12, 2004. *See Capra Decl. ¶ 9 & Exhibit 4.*

17. On October 12, 2004, the balance in the RCM Accounts was \$586,087,197. During the period from October 12, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$274,040,931. *See Capra Decl. ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.*

18. On August 5, 2004, the date the LBO Transaction closed, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See id.*

F. Mayer Brown Defendants

19. Mayer Brown LLP and Messrs. Collins, Koury and Best provided certain legal services, at RGL's direction, to RGL in connection with the LBO. *See Capra Decl. ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶¶ 257–58.*

20. On August 5, 2004, the date the LBO Transaction closed, the balance in the RCM Accounts was \$541,577,862. During the period from August 5, 2004 to the time immediately

preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$229,531,596. *See Capra Decl.* ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6, and Exhibit 2.

21. On October 12, 2004, the date of the initial S-4 filing by RGL and Refco Finance, the balance in the RCM Accounts was \$586,087,197. During the period from October 12, 2004 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$274,040,931. *See id.*

22. Mayer Brown LLP and Messrs. Collins and Best provided certain legal services, at Refco's direction, to Refco in connection with the IPO. *See Capra Decl.* ¶ 11 and Exhibit 6 (Amended Complaint excerpt) at ¶ 279.

23. On August 10, 2005, the day the Refco IPO commenced, the balance in the RCM Accounts was \$395,230,539. During the period from August 10, 2005 to the time immediately preceding the October 2005 Transfer, the balance in the RCM Accounts decreased, on a net basis, by \$83,184,273. *See Capra Decl.* ¶¶ 2, 6, and Exhibit 1 (Krys Expert Report) Appendix 6 and Exhibit 2.

Dated: New York, New York
August 2, 2012

KING & SPALDING LLP

By: /s/ James J. Capra, Jr.
James J. Capra, Jr.
James P. Cusick
1185 Avenue of the Americas
New York, New York 10036
Tel: (212) 556-2100

*Attorneys for Defendant
PricewaterhouseCoopers LLP*

**WILMER CUTLER PICKERING
HALE AND DORR LLP**

By: /s/ Philip D. Anker
Philip D. Anker
Peter J. Macdonald
Jeremy S. Winer
Ross E. Firsenebaum
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Tel: (212) 230-8800

*Attorneys for Defendants Credit Suisse
Securities (USA) LLC and Merrill Lynch,
Pierce, Fenner & Smith, Incorporated, as
successor-by-merger to Banc of America
Securities LLC*

LINKLATORS LLP

By: /s/ James R. Warnot, Jr.
James R. Warnot, Jr.
Ruth E. Harlow
Robert H. Bell
1345 Avenue of the Americas
New York, New York 10105
Tel: (212) 903-9000

*Attorneys for Defendant Deutsche Bank
Securities Inc.*

WILLIAMS & CONNOLLY LLP

By: /s/ Craig D. Singer
John K. Villa
George A. Borden
Craig D. Singer
725 Twelfth Street, NW
Washington, DC 20005
Tel: (202) 434-5000

*Attorneys for Defendants Mayer Brown LLP
and Edward S. Best*

COOLEY LLP

By: /s/ William J. Schwartz
William J. Schwartz
Jonathan P. Bach
Reed A. Smith
1114 Avenue of the Americas
New York, NY 10036-7798
Tel: (212) 479-6000

Attorneys for Defendant Joseph P. Collins

CLAYMAN & ROSENBERG

By: /s/ Charles E. Clayman
Charles E. Clayman
305 Madison Avenue, Suite 1301
New York, NY 10165
Tel: (212) 922-1080

Attorneys for Defendant Paul Koury

WINSTON & STRAWN LLP

By: /s/ Linda T. Coberly
Linda T. Coberly
Bruce R. Braun
Catherine W. Joyce
David J. Doyle
35 W. Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700

Luke A. Connally
200 Park Avenue
New York, New York 10166
Ph: (212) 294-6700
Fax: (212) 294-4700

*Attorneys for Defendants
Grant Thornton LLP and Mark Ramler*